Mok Tai Dwan v Kelang Pembena Kereta-Kereta Sdn Bhd and another application

HIGH COURT (JOHOR BAHRU) — KOD NO 22–357 OF 1993 AND ORIGINATING SUMMONS NO 24–737 OF 1993
MOHD GHAZALI J
22 NOVEMBER 1995

Landlord and Tenant *— Lease — Covenant to repair — Lessee to keep premises 'in tenantable repair ... fair wear and tear excepted' and 'to repair and maintain roofs' — Whether lessee's duty to replace roofs — Whether roofs principal or subsidiary part of premises — Whether replacement of roofs could be termed 'repair'*

Landlord and Tenant *— Lease — Forfeiture — Dispute between lessee and lessor over repair of roofs — Whether lessee could withhold rental after setting off costs of roof repairs — Whether letter of forfeiture justified*

Tort *— Inducement to breach contract — Interference with contractual relations — Lessor terminating lease with lessee — Notice of termination given to sub-lessees by lessor inviting them to enter into fresh tenancy agreements — Whether action constitutes interference with contractual relations between lessee and sub-lessees*

Words and Phrases *— 'Repair'*

Words and Phrases *— 'Fair wear and tear excepted'*

Kelang Pembena Kereta-Kereta Sdn Bhd ('KPKK') owned a piece of land ('the land') on which stood five buildings ('the premises'). In 1989, KPKK granted to Mok Tai Dwan ('Mok') a lease of the land for a term of six years. Clause 4(g) and (k) of the lease provided, inter alia, that the lessee should keep the premises 'in tenantable repair ... fair wear and tear excepted' and 'to repair and maintain the roofs'. The terms of the lease permitted subletting and subsequently Mok entered into several subtenancy agreements. From the outset, the subtenants complained about the condition of the roofs of the premises and Mok carried out repairs but to no avail. As Mok's request to KPKK to replace the roofs were without success, he replaced one of the roofs at his own expense but failed to get reimbursement from KPKK. They denied that the leaking roofs were their responsibility and maintained that under the terms of the agreement it was Mok's obligation, as lessee, to repair and maintain the roofs. An engineer's report on the condition of the premises recommended the replacement of all the roofs. Matters did not improve and the subtenants began to leave and Mok began to withold the rental due to KPKK. Consequently, KPKK gave notice of breach of the lease and determined and forfeited the lease when Mok did not accede to their demand for the arrears. KPKK also informed all the subtenants that the lease granted to Mok had been determined and forfeited and required them to vacate the premises. Mok sought, inter alia, an

injunction to restrain KPKK from inducing the subtenants to breach their agreements with Mok, an injunction to restrain KPKK from terminating the lease agreement between them, an order that KPKK appointed a contractor to replace the roof to one building and to repaint the other buildings, and a declaration that the purported termination of the lease be declared invalid. KPKK claimed that Mok had breached the terms of the lease by not paying the rental and in failing to maintain the premises in tenantable repair. They sought orders requiring Mok and all the subtenants to vacate the property within 24 hrs, requiring Mok to pay the arrears of rental and requiring Mok and the subtenants to pay mesne profits and/or damages. Mok contended that, by virtue of cl 4 of the lease, tenantable repairs brought on by fair wear and tear were KPKK's obligation, that KPKK was obliged to effect reasonable repairs upon being given notice and that, with regards to the roofs, he was only obliged to repair and maintain them but not to replace them as a new structure. Mok also counterclaimed in relation to tortious conduct of KPKK in wrongfully dealing with the subtenants and/or wrongfully procuring breaches of their subtenancies and prayed for damages. Both actions were tried together by consent of all parties with the issue of liability to be determined first.

Held, allowing Mok's application in part:

(1) On the facts and on a proper construction of cl 4 of the lease, the duty to replace the roofs and to bear the costs incurred thereon was on the lessor, KPKK. The roofs were beyond repair due to 'fair wear and tear' and needed to be replaced and accordingly Mok was excepted from his covenant to repair. The roofs formed the principal, not a subsidiary, part of the buildings as their existence was vital in relation to the usage of the premises. Furthermore, replacing the roofs would amount to putting the premises into a better state of repair than that in which they were at the commencement of the lease; the replacement of the roofs could not be termed 'repairs' within the terms of the covenant. Thus, Mok had not breached his covenant to repair as the replacement of the roof was not within the contemplation of cl 4(g) and (h) of the lease (see pp 604I, 605D–F, 607D and 608I–609A); *Sleafer v Lambeth Borough Council* [1960] 1 QB 43; [1959] 3 All ER 378; [1959] 3 WLR 485, *Felton & Anor v Brightwell & Anor* [1967] NZLR 276; *Lurcott v Wakely & Wheeler* [1911] 1 KB 905; [1911–13] All ER Rep 41 and *Staples & Co v Berryman & Anor* [1928] NZLR 68 distinguished; *Collins v Winter & Anor* [1924] NZLR 449 not followed; *Lister v Lane & Nesham* [1893] 2 QB 212; [1891–94] All ER Rep 388 followed.

(2) On the evidence, it could not be said that KPKK, by dealing directly with the subtenants, had induced the subtenants to breach their contract with Mok. There was no evidence of any contractual arrangement between KPKK and Mok's subtenants.

KPKK did not commit any actionable interference in the contractual relations between Mok and his sub-lessees (see p 616D,E); *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 and *Greig v Insole* [1978] 3 All ER 449; [1978] 1 WLR 302 followed.

(3) On the question of whether KPKK's letter of forfeiture to Mok due to non-payment of rental was justified on the facts and under the terms of the lease agreement, it could only be dealt with when the issue on quantum of damages was assessed as no sufficient evidence had been adduced on the amount of rental due (see p 616E).

[Bahasa Malaysia summary

Kelang Pembena Kereta-Kereta Sdn Bhd ('KPKK') mempunyai sebidang tanah ('tanah itu') dimana lima buah bangunan telah didirikan di atasnya ('premis itu'). Dalam 1989, KPKK memberikan Mok Tai Dwan ('Mok') satu pajakan tanah itu untuk tempoh enam tahun. Fasal 4(g) dan (k) pajakan itu memperuntukkan, antara lainnya, bahawa penerima pajakan harus menjalankan pembaikan supaya premis itu berada 'dalam keadaan yang boleh didiami/disewa ... haus dan lusuh yang munasabah dikecualikan' dan 'untuk membaiki dan menyelenggarakan bumbung'. Syarat-syarat pajakan itu membenarkan penyewaan kecil dan Mok kemudiannya telah memasuki beberapa perjanjian penyewaan kecil. Dari mula lagi, penyewa kecil mengadu tentang keadaan bumbung premis itu dan Mok telah melakukan kerja membaiki tetapi ianya tidak berkesan. Oleh kerana permintaan Mok kepada KPKK untuk menggantikan bumbung itu tidak berjaya, beliau pun menggantikan satu daripada bumbung itu menggunakan wangnya sendiri tetapi gagal mendapat pembayaran balik daripada KPKK. Mereka menafikan bahawa bumbung yang bocor itu adalah tanggungjawab mereka dan mengambil pendirian bahawa di bawah syarat-syarat perjanjian itu adalah obligasi Mok, sebagai penerima pajakan, untuk memperbaiki dan menyelenggarakan bumbung itu. Satu laporan jurutera tentang keadaan premis itu mengesyorkan penggantian kesemua bumbung itu. Keadaan tidak bertambah baik dan penyewa kecil mula meninggalkan premis itu dan Mok mula tidak memberikan bayaran sewa yang kena dibayar kepada KPKK. Oleh itu, KPKK memberikan notis kemungkiran pajakan itu dan menamatkan dan melucut hak pajakan itu apabila Mok tidak bersetuju kepada tuntuan mereka untuk tunggakan sewa tersebut. KPKK juga memberitahu kesemua penyewa kecil bahawa pajakan yang diberikan kepada Mok telah ditamatkan dan dilucut hak dan menghendaki mereka supaya mengosongkan premis itu. Mok memohon, antara lainnya, satu injunksi untuk menyekat KPKK daripada mendorong penyewa kecil untuk memungkiri perjanjian mereka dengan Mok, satu injunksi untuk menyekat KPKK daripada menamatkan perjanjian pajakan di antara mereka, satu perintah supaya KPKK melantik seorang kontraktor untuk menggantikan bumbung salah satu daripada

bangunan tersebut dan untuk mengecat bangunan-bangunan yang lain, dan satu deklarasi bahawa penamatan pajakan yang dikatakan itu adalah tidak sah. KPKK mengatakan bahawa Mok telah mengingkari syarat-syarat pajakan itu apabila dia tidak membayar sewa dan gagal menyelenggarakan premis itu dalam keadaan '*tenantable repair*'. KPKK memohon perintah yang menghendaki Mok dan kesemua penyewa kecil mengosongkan premis itu dalam masa 24 jam, menghendaki Mok membayar tunggakan sewa dan menghendaki Mok dan penyewa kecil membayar hasil perantaraan dan/atau ganti rugi. Mok berhujah bahawa, memandangkan fasal 4 pajakan itu, kerja pembaikan haus dan lusuh yang munasabah supaya premis itu berada dalam keadaan yang boleh didiami/disewa merupakan obligasi KPKK, bahawa KPKK harus menjalankan kerja pembaikan yang berpatutan selepas diberi notis, dan bahawa berkenaan dengan bumbung, dia sendiri cuma harus membaiki dan menyelenggarakan mereka tetapi bukan menggantikan mereka sebagai struktur baru. Mok juga menuntut balas berkenaan dengan kelakuan KPKK yang bersifat tort ketika berurusan secara salah dengan penyewa kecil dan/atau cuba memperolehi secara salah kemungkiran penyewaan kecil, lalu Mok memohon untuk ganti rugi. Kedua-dua tindakan telah dibicarakan bersama dengan persetujuan kesemua pihak, dan isu liabiliti ditentukan dulu.

Diputuskan, membenarkan sebahagian permohonan Mok:

(1) Mengikut fakta dan atas pentafsiran wajar fasal 4 pajakan itu, tugas menggantikan bumbung itu dan membiayai kos yang dibelanjakan terletak pada pemberi pajakan, KPKK. Bumbung itu tidak dapat diperbaiki kerana 'haus dan lusuh' dan terpaksa digantikan dan oleh itu Mok dikecualikan daripada waadnya untuk membuat kerja membaiki. Bumbung itu membentuk bahagian utama, dan bukan bahagian subsidiari, bangunan itu kerana kewujudan mereka adalah penting berkenaan dengan penggunaan premis itu. Lagipun, penggantian bumbung itu samalah dengan meletakkan premis itu dalam keadaan yang lebih baik daripada keadaannya pada permulaan pajakan itu; penggantian bumbung itu tidak boleh ditermakan sebagai 'pembaikan' mengikut syarat-syarat waad itu. Oleh itu, Mok tidak memungkiri waadnya untuk membuat kerja membaiki kerana penggantian bumbung itu bukan dalam jangkaan fasal 4(g) dan (h) pajakan itu (lihat ms 604I, 605D–F, 607D dan 608I–609A); *Sleafer v Lambeth Borough Council* [1960] 1 QB 43; [1959] 3 All ER 378; [1959] 3 WLR 485, *Felton & Anor v Brightwell & Anor* [1967] NZLR 276; *Lurcott v Wakely & Wheeler* [1911] 1 KB 905; [1911–13] All ER Rep 41 dan *Staples & Co v Berryman & Anor* [1928] NZLR 68 dibeza; *Collins v Winter & Anor* [1924] NZLR 449 tidak diikut; *Lister v Lane & Nesham* [1893] 2 QB 212; [1891–94] All ER Rep 388 diikut.

(2) Mengikut keterangan, tidak boleh dikatakan bahawa KPKK, dengan berurusan secara terus dengan penyewa kecil, telah mendorong penyewa kecil memungkiri kontrak mereka dengan Mok. Tidak ada keterangan tentang apa-apa hubungan kontrak antara KPKK dengan penyewa kecil Mok. KPKK tidak melakukan apa-apa gangguan boleh didakwa dalam hubungan kontrak antara Mok dan penyewa kecilnya (lihat ms 616D,E); *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 dan *Greig v Insole* [1978] 3 All ER 449; [1978] 1 WLR 302 diikut.

(3) Berkenaan dengan soalan sama ada surat perlucuthakan kepada Mok akibat kegagalan membayar sewa adalah berjustifikasi mengikut fakta-fakta dan di bawah syarat-syarat perjanjian pajakan, ia hanya boleh dipertimbangkan apabila isu kuantum ganti rugi ditaksirkan kerana keterangan yang mencukupi tidak diberikan tentang jumlah sewa yang kena dibayar (lihat ms 616E).]

[*Editorial Note*: The first defendant in Originating Summons No 24-737 of 1993 has appealed to the Court of Appeal vide Civil Appeal No J 02–854–1995.]

Notes

For cases on covenant to repair, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1037–1038;[1991] *Mallal's Digest* para 1432.

For cases on inducement of breach of contract, see 12 *Mallal's Digest* (4th Ed) para 166.

Cases referred to

Brew Bros Ltd v Snax (Ross) & Anor [1970] 1 QB 612; [1970] 1 All ER 587; [1969] 3 WLR 657

Collins v Winter & Anor [1924] NZLR 449

DC Thomson & Co Ltd v Deakin & Ors [1952] Ch 646; [1952] 2 All ER 361

Felton & Anor v Brightwell & Anor [1967] NZLR 276

Greig v Insole [1978] 3 All ER 449; [1978] 1 WLR 302

Lister v Lane & Nesham [1893] 2 QB 212; [1891–94] All ER Rep 388

Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105

Lurcott v Wakely & Wheeler [1911] 1 KB 905; [1911–13] All ER Rep 41

Post Office v Aquarius Properties Ltd [1985] 2 EGLR 105

Ravenseft Properties Ltd v Davstone (Holdings) Ltd [1980] QB 12; [1979] 1 All ER 929; [1979] 2 WLR 898

Shanghai Hall Ltd v Town House Hotel Ltd [1967] 1 MLJ 223

Sleafer v Lambeth Borough Council [1960] 1 QB 43; [1959] 3 All ER 378; [1959] 3 WLR 485

A *Staples & Co v Berryman & Anor* [1928] NZLR 68

Legislation referred to

National Land Code 1965 ss 5, 232(1)(b), 233(b), 235

B *T Balaskanda* (*Zaman & Associates*) and *Cyrus Das* and *Steven Thiru* (*Shook Lin & Bok*) for the plaintiff in KOD No 22–357 of 1993 and for the first defendant in Originating Summons No 24–737 of 1993.

Nitin Nadkarni (*Lee Hishammuddin*) for the defendant in KOD No 22–357 of 1993 and for the plaintiff in Originating Summons No 24–737 of 1993.

C *Tan Hing Kuang* (*Tam Cheng Yau Tan & Co*) for the second, fourth and sixth defendants in Originating Summons No 24–737 of 1993.

Ng Chew Hor (*Leng & Co*) for the fifth defendant in Originating Summons No 24–737 of 1993.

Adi Radlan (*Mak Ng Shao & Kee*) for the seventh defendant in D Originating Summons No 24–737 of 1993.

Aishah Rani (*Lim Han & Teoh*) for the eighth defendant in Originating Summons No 24–737 of 1993.

Ninth defendant did not appear and was not represented.

Cur Adv Vult

E

Mohd Ghazali J: Both these actions were heard together with the consent of all parties and the background to the dispute is as follows.

Kelang Pembena Kereta-Kereta Sdn Bhd ('KPKK') is the registered proprietor of a piece of industrial land held under QT(R) 1917 Lot No F TLO 1995 in the township of Johor Bahru ('the land'). There are five blocks of buildings standing upon the land which are referred to collectively as No 64, Jalan Langkasuka, 80350 Johor Bahru ('the premises') and which were constructed sometime in 1968. The evidence shows that the premises were used as a car-assembly plant which ceased operations sometime in 1986 or 1987. The premises were then left unoccupied until G 1989.

By a lease dated 10 August 1989, KPKK granted to one Mr Mok Tai Dwan ('Mok'), a lease of the land for a term of six years commencing 1 October 1989 and terminating on 30 September 1995 ('the lease'). It was agreed that the monthly rental for the first 36 months shall be at H RM84,000 and thereafter RM92,400. There was also an option to renew the lease for another two years.

According to cl 5(e) of the lease agreement, Mok shall be at liberty to sublease or sublet the premises. Mok subsequently entered into several subtenancy agreements with several companies which commenced I operations of their own businesses in the premises which included the manufacturing of certain equipment. At the outset, two of the five blocks were marked as G1 and G2 and the other three blocks were each partitioned and marked as A & F, B & E, and C & D respectively.

From the word 'go', the subtenants made continuous complaints to Mok about the condition of the roofs to the premises; they complained that the roofs leaked badly which in turn have affected their productivity. To make the subtenants happy, Mok began to do patchwork repairs upon the roofs but that did not actually alleviate the problem. The roofs continuously leaked and as a result of a few heavy downpours which, of course, affected their manufacturing operations and their machinery, the subtenants continuously kept up with their complaints and consequently threatened to terminate their tenancies; some even went to the extent of withholding their rental with the hope that Mok would undertake more effective measures to prevent the roofs from leaking.

The matter became more serious and to ward off the pressure from his subtenants, Mok informed KPKK of their complaints and requested KPKK to take the necessary steps to replace the roofs — he insisted that the roofs were beyond repair. Since KPKK did not respond too kindly to Mok's request, Mok went to the extent of replacing the roof of one of the blocks (Block C) allegedly at the cost of RM85,618 in December 1989 but failed to get reimbursement from KPKK who denied that the leaking roofs were their responsibility. KPKK contended that in accordance with the terms under the agreement, it was Mok's responsibility, being the lessee, to repair and maintain the roofs.

As a result of the dispute as to whose responsibility it was to replace the roofs, the relationship between KPKK and Mok became strained. This was further aggravated by delays in paying the monthly rental to KPKK by Mok.

In response to the delays in paying rental, KPKK commenced writing the usual letters as expected from a landlord when a tenant is slow in paying rent.

Consequently, as a result of Mok's consistent requests to replace the roofs, KPKK engaged the services of a consultant engineer to inspect and prepare a report about the condition of the premises. The gist of the engineer's report dated 20 July 1990, which to me is an important document in this action, is as follows:

(i) it is understood that the premises were constructed in 1968;

(ii) that the premises were used as a car assembly plant until 1986; and

(iii) that the existing condition of the premises indicates a lack of proper maintenance.

His observations on the five blocks were as follows:

(a) Block G2

The entire roof of this building is badly corroded. Some of the roofing sheets had been replaced recently. All the steel works are rusting. This condition reveals that the surrounding air has a high level of corrosiveness.

(b) Block G1

The roof trusses for this building are of timber structure of 60ft span, in double bay. No cross bracings were provided in between all the trusses. The

condition of some of the timber members has deteriorated resulting in deflection to those trusses effected. These trusses were kept vertically only by the timber purlins against the wind all this while. A strong wind on 25 June 1990 had caused most of the roof trusses to sway considerably about one foot, towards the end of the building. The sway in turn had caused some of the asbestos roof sheets to crack up, resulting in leaks. The damaged roof sheets had been replaced and a cable stay was introduced to hold back the end swayed truss from collapsing. This measure is only temporary. The present condition of these timber trusses is pretty serious and in our opinion they will not stand up for long should there be a strong wind blowing towards the gable end of the building.

(c) Blocks A and F

A lean-to extension abutting the frontage of Blocks A & F was constructed more than a decade ago. Visual vertical and horizontal cracks had occurred between the original building and the extension.

(d) Blocks C and D

It is understood that the existing metal roofing to these blocks was in a dilapidated condition and as such the whole roof was stripped off and replaced by asbestos roofing sheets sometime in October 1989. The steel roof trusses together with the purlins are rusting. It is believed that these structural members had not been maintained since constructed. Some roof repairs were carried to Blocks A and B.

(e) Blocks E and F

The condition of the roofing sheets in these blocks is similar to those in blocks A, B, C and D. The g.i gutters had been corroded and are no more functional. The condition of this roof trusses is similar to those of the rest of the blocks.

The report then went on to say as follows:

4 Proposed rectification

(a) Roofing

Generally the roof covering of all the main buildings is in a very bad state. The life span of the roof cover is running out and therefore it is not technically viable to replace a few sheets here and there leaving the rest intact. It is a matter of time that the leaks will spread out to other areas. The only solution to this problem is to replace the existing corroded roofing by either aluminium or zincalume.

(b) Timber roof trusses

Some of the timber members have shown signs of defects and they need to be replaced. Practically all the roof trusses have swayed to one side and unless the entire roofing is taken down it is not possible to correct their alignments. The existing asbestos roof sheetings are in a bad condition and they need replacement. Under this situation all the timber purlins have to be dismantled progressively, the trusses rectified and put to correct alignments.

Under the heading 'financial implication' the report, inter alia, stated: A

> In view of the foregoing the cost for the rectification works would definitely be much higher than the new works

and under the heading 'comment' the report stated:

> It has to be enlightened at this point in time that immediate action must be taken to rectify the swayed roof trusses. The present situation is very serious and the probability of them collapsing in a strong wind. Since the condition of the roof covering is in a very bad state, it is matter of time when the replacement needs to be executed. The buildings after having been upgraded, should be maintained regularly. B

Briefly, the report advised that all the roofs covering all the blocks be replaced as they were in a very bad condition. C

Despite several meetings and voluminous correspondence between Mok and KPKK, no one gave in and each insisted that it was the other's responsibility to replace the roofs. KPKK insisted that it was a term and condition of the lease that it was the obligation of Mok to keep the premises in tenantable repair and to keep the roofs in good condition. D

Consequently, a second report on the premises dated 5 March 1991 was prepared by the same consultant engineer after another inspection. It reads, inter alia:

> Block G2 E
>
> The entire roof of this building was badly corroded. This was highlighted in the previous report dated 20 July 1990 ... It appeared that since the building was completed and occupied, no maintenance was carried out to the roof trusses and as such, most of the roof trusses and purlins were rusting quite seriously ... F
>
> Comments
>
> As mentioned in the foregoing paragraphs, the condition of the entire roof of this building was badly rusted and corroded as well. This showed that the surrounding air had a high level of corrosiveness. The g.i. roofing sheets, since installed, had been left unmaintained throughout the years and its condition had been deteriorating with time. The building was left vacant for G a couple of years and its condition should be upgraded to a reasonable standard before being occupied again. It was observed that this action was lacking. Hence giving rise to the roof leak problem. Most of the steel roof trusses and 'C' lip purlins were also rusting, and some of which were quite serious. H
>
> Recommendations
>
> Replacing the corroded corrugated g.i. sheets here and there would not solve the leak problem. The life span of these corrugated g.i. sheets had been up and it is strongly recommended that the entire existing corrugated g.i. sheets be replaced either with profiled aluminium or zincalerme sheets of thickness 0.48mm. Prior to the replacement of the roofing sheets, all the I steel trusses must be rid off all rust by brushing and sand-papered and repainted with a 13 layer of lead oxide, an under coat and a finishing coat.

The matter of who should be responsible to replace the roofs dragged on into the year 1992 and consequently one of the subtenants left. A few more subtenants also left in 1993 although Mok did manage to get some new subtenants. However, from the month of January 1993 onwards, Mok began to withhold the rental due to KPKK.

By a letter dated 23 August 1993, KPKK's solicitors wrote to Mok informing him that he was in arrears of the rents for the months of January to August 1993 which amounted to RM739,200 (RM92,400 x 8) and requesting him to remedy the breach within seven days failing which the lease 'shall be deemed forfeited by our clients without any further notice to you and our clients will exercise all rights and remedies available to them, inter alia, the recovery of the said sum and possession of the premises'.

Since the sum demanded was not forthcoming, by a letter dated 13 September 1993, KPKK's solicitors informed Mok's solicitors, inter alia, as follows:

> We note that your client has failed to remedy his breach of the above lease and the same is now determined and forfeited.
>
> Kindly request your client to immediately vacate the above property and deliver vacant possession of the same to our client.

By a letter dated 14 September 1993 and addressed to all the subtenants, KPKK informed them that the lease granted to Mok had been determined and forfeited and required them to vacate the premises unless a fresh tenancy on mutually agreed terms could be reached.

On 22 September 1993, the registration of the lease was cancelled by the land registry upon KPKK's application. Almost simultaneously both Mok and KPKK filed their respective suits against one another in September 1993.

In his suit (KOD No 22–357–1993 filed on 23 September 1993) against KPKK, Mok prays for the following orders, namely:

(a) an injunction to restrain KPKK from inducing the subtenants from breaching their lease agreements with Mok;

(b) an injunction to restrain KPKK from terminating the lease agreement between them;

(c) that the lease agreement between Mok and KPKK is valid;

(d) that KPKK appoint a contractor to change the roof of Block C and repaint Block A, B, C and D;

(d(i)) that the purported termination or forfeiture of the said lease by letter dated 13 September 1993 be declared invalid;

(e) costs; and

(f) other reliefs that the court deems fit.

Mok, also alleged, inter alia, that KPKK 'went behind his back' to meet his subtenants to terminate their agreements with him and thereby inducing them to breach the terms of their respective agreements with him.

In its defence, KPKK contended that it was a term and condition of the lease that it was the obligation of Mok to keep the premises in tenantable repair and to keep the roofs in good condition. KPKK also claimed that it changed the roof of Block E in late 1990 and early 1991 because the situation was desperate from the safety point of view and that it was made clear to Mok that KPKK carried out repairs without any admission of liability to carry out further repairs. KPKK also claimed that Mok has, from the commencement of the lease, been breaching the terms of the lease in that

(i) he has not been paying the agreed rental on time or at all; and

(ii) he has failed to maintain the said premises in tenantable repair and in good condition.

In its suit against Mok and the subtenants (OS 24–737–1993 filed on 25 September 1993), KPKK prays for the following orders, namely:

(i) that Mok and all the subtenants quit and vacate the property within 24 hrs;

(ii) that Mok pay arrears of rental for January to August 1993 amounting to RM739,200.

(iii) that Mok and the subtenants pay KPKK mesne profits and/or damages;

(iv) interest at 8% from 25 August 1993 until payment;

(v) costs; and

(vi) any other relief.

In his defence, Mok contended that at the time when the lease agreement was signed, the premises were not in a habitable or tenantable condition as they were vacant for a considerable time and that the premises were in a damaged condition following the dismantling of the assembly plant. He claimed that he spent RM1m at his own expense to restore the building to a tenantable state when he took over the premises.

Mok also contended that by virtue of cl 4(g) of the lease agreement, tenantable repair brought by fair wear and tear was the obligation of KPKK as lessor and that under cl 4(h), KPKK was obliged to effect reasonable repairs upon giving notice. With regard to the roofs, Mok contended that by virtue of cl 4(k), he was only obliged to repair and maintain them but not to replace or renew the roofs as a new structure. He countered that the purported forfeiture of the said lease was bad in law and void.

Mok also counterclaimed — he claimed that KPKK wrongfully dealt with the subtenants and/or wrongfully procured breaches of their subtenancies with him as follows:

A (a) by communicating directly with his subtenants;

(b) by offering his subtenants direct tenancy relationship; and

(c) by signing direct tenancy agreements with one or more of the subtenants.

B He claimed that the above was tantamount to tortious conduct on the part of KPKK which consequently caused extensive loss and damage to him, namely, several tenants withheld their rental payable under the subtenancies and some prematurely terminated their subtenancies and some even went to the extent of signing new tenancies directly with KPKK. In his counterclaim Mok prayed for:

C (1) damages in the form of loss of rental;

(2) damages for wrongful forfeiture and cancellation of lease;

(3) damages for breach of agreement;

(4) damages for tort of wrongfully inducing breaches of contract; and

D (5) a refund of all expenditure etc incurred by him.

At the outset of the trial, counsel for KPKK informed the court that it was not proceeding against the third subtenant defendant, ie Bensons Metal Products Sdn Bhd.

E In the course of the trial the parties, by consent, agreed that the issue of liability should be tried first and that the quantum of damages was to be assessed later, depending upon the outcome of the liability question. The issues which both parties requested the court to determine at this trial are:

(i) whether, on the facts and on the proper construction of cl 4(g), (h) and (k) of the lease agreement dated 10 August 1989, the duty to replace the roof was on Mok or on KPKK;

F

(ii) whether the letter of forfeiture of 13 September 1993 was justified on the facts and under the terms of the lease agreement; and

(iii) whether, on the facts, there was inducement to breach the subtenancies by the landlord (KPKK) and whether KPKK is liable to Mok for damages under this head.

G

The relevant sub-clauses of cl 4 of the lease, wherein the lessee covenants, read:

H (g) To keep the demised premises in proper sanitary condition and in tenantable repair at all times during the term of this tenancy, fair wear and tear excepted;

(h) To permit the lessor or his agent with or without workmen at reasonable times to enter upon and examine the condition of the demised premises and to give the lessee written notice to effect any reasonable repairs thereto in a proper and workmanlike manner; provided that if the lessee shall fail to comply with such notice within a reasonable time, then the lessor may effect any such repairs in a proper manner and workmanlike manner, and the costs thereof shall become a debt due from the lessee to the lessor recoverable forthwith (fair wear and tear excepted) ...

I

(k) Notwithstanding anything herein stated, to repair and maintain the roofs, gutter, drainage and sewerage system, walls, floors, paintwork, water tanks doors, windows and fencing, roadways and yards of the demised premises.

In his submission counsel for KPKK argued that the evidence shows that the roofs were damaged by Mok and his contractors when they removed the chimney stacks, dismantled the machinery, ovens and spray booths which were found in the premises at the commencement of the lease after agreeing to buy those items for its scrap value. He however conceded that the roofs were in a state of disrepair at the commencement of the lease but contended its state of disrepair was aggravated by Mok and his contractors when they undertook to remove all the items stated above which were items used to run the former car-assembly plant. He then argued that the lease was taken on an 'as is' position and in such circumstances and in any event, in law, KPKK did not warrant the fitness or purpose of the premises — to support his contention, he referred to a letter dated 23 February 1989 from UMW, the parent company of KPKK, offering to rent the premises to Mok. The letter reads:

> We are offering to rent the said premises in vacant possession and in its 'as is' condition under the following basic terms and condition ...

Counsel then argued that the lease agreement also did not state that KPKK was obliged to replace or repair the roofs. He submitted by virtue of cl 4(g) of the lease agreement it was clear that the obligation to repair, inter alia, the roofs, was upon Mok and that under cl 4(h), KPKK has the authority to enter and examine the condition of the premises and give written notice to Mok to effect repairs and if Mok fails to comply with the notice, KPKK may thereupon effect the repairs and recover the costs of repair from Mok. He further argued there is no covenant in the lease agreement obligating KPKK to repair or replace any part of the premises neither is there an implied warranty in law to do so.

He also submitted that the implied warranty under s 232(1)(b) of the National Land Code 1965 has no relevance here. Section 232 reads:

(1) The following agreements on the part of the lessor shall be implied in every lease granted under Chapter 1 in the absence of any express provision therein to the contrary —

...

(b) where the lease relates to a part only of any building, that the lessor will keep in repair the roof, the main walls and main drains, and any common passages or installations;

...

(2) The like agreements shall be implied in every sub-lease so granted, in the absence of any express provision therein to the contrary, and subject to the necessary modifications.

Counsel submitted that s 232(1)(b) of the Code is only relevant to a lease of part of a building and that that provision is of no relevance to the instant case. He argued KPKK made no warranty that the premises were fit for

use and that it was up to Mok to put the premises into a position suitable for his purpose. He then referred to cl 4(k) of the lease agreement wherein Mok as lessee covenants, inter alia, to repair and maintain the roof, gutters, drainage and sewage system etc.

He contended that an obligation to repair includes an obligation to replace. To support the above arguments counsel referred to several authorities wherein the courts have ruled that the law imposes no obligation on the landlord to keep demised premises in repair. One of the several authorities referred to by counsel was the case of *Sleafer v Lambeth Borough Council* [1960] 1 QB 43; [1959] 3 All ER 378; [1959] 3 WLR 485. In that case, a local authority let a flat to a tenant on a weekly tenancy under a written tenancy agreement, containing no express stipulation as to liability to repair. Clause (15) of the tenancy agreement reads: 'The tenant shall deliver up the dwelling at the end of the tenancy together with all the landlords' fixtures in good and tenantable repair and condition (subject to fair wear and tear) and with all locks, keys and fastenings complete.' The evidence shows that in practice the repairs were done by the landlords. The tenant was injured when the handle or knocker of the front door came away in his hand and the tenant's case was that the landlords, the Lambeth Borough Council, were in breach of their duty by failing to keep his front door in proper repair. The tenant's action failed. Willmer LJ said ([1960] 1 QB 43 at p 62; [1959] 3 All ER 378 at p 387; [1959] 3 WLR 485 at p 496):

> It is well established that, in the absence of agreement to the contrary, the law imposes no obligation on a landlord to keep the demised premises in repair.

Willmer LJ was also of the view that no obligation can be implied on the part of the landlords to execute repairs and, in particular, repairs to the front door.

Counsel also referred to the case of *Felton & Anor v Brightwell & Anor* [1967] NZLR 276. In that case the lessors leased to the lessees a farm for a term of ten years — the farm was used for dairying purposes. The evidence for the lessees was that at the commencement of the term, the farm was run down and the buildings and improvements dilapidated. The lease contained a covenant by the lessees to repair and keep in good and tenantable repair and condition (depreciation from fair wear and tear excepted), all buildings, fences, gates, culverts and other erections or improvements. There was also a special provision requiring the lessees to paint the farmhouse before a certain date.

While the lessees were in the process of painting the house, they called in the electrical power board to disconnect the wires and this resulted in an examination being made of the whole service line supplying the farm. In consequence of the inspection the lessees received from the electric power board a letter advising that the service line was below regulation standard and requesting permission to carry out the necessary repair work; they also informed that the electricity supply might be disconnected if no reply was received within 30 days. A similar letter was

sent to the lessors who chose to ignore it. As the lessees had to continue milking their cows, they felt that they had no option but to have the necessary repair work carried out and pay for it. Having paid the expenses, they sued the lessors for recovery. They argued that the work done was not repairs but a complete renewal of a capital nature which was the responsibility of the lessors, the service line being part of the demise. The magistrate held that the lessees were entitled to recover.

The lessors' appeal was allowed. Wild CJ said (at p 277):

> In this court the principal submission for the lessees was that the installations were fixtures on the land at the time of the lease and passed with the demise. Accepting that this is so, the question still remains as to whether any liability to maintain and, if necessary, renew the installations rested on the lessors. Apart from express stipulations there is no obligation on a lessor during the term of the lease to repair or maintain improvements. This was recognized as long ago as *Gott v Gandy* (1853) 2 E & B 845. There the tenants of workshops and buildings claimed to recover from their landlord in respect of his failure to repair a chimney which was part and parcel of the premises and which, without any neglect or default on their part, got into an insecure state and fell down. It was held that the duties between landlord and tenant arise from contract and that, since there was no contract requiring the landlord to repair, he was not bound to do so. In the present case also there was no term in the lease requiring the lessors to repair. It is true that there are various provisions in the lease which carry the implication that the land was leased for dairy farming, and I will accept that a dairyfarm in the Waikato requires electric power. But this falls far short of requiring an obligation to maintain a supply of electric power to be implied against the lessors. A lessee must take land as he finds it and there is no covenant or condition implied by law that land that is leased is fit for the purpose for which it is taken: *Sutton v Temple* (1843) 12 M & W 52.

It is my view that the cases referred to above were decided on facts which differ from the instant case. In the first case, the item in issue was merely the handle or knocker of the front door and in the second case, the item in issue was only the service line supplying the farm with electricity that needed replacement. To me, those items are only subsidiary parts of the demised premises. The facts of both cases show that only repair or part replacement were required to put both items into good working condition — there was no need to replace the door or the whole electrical system respectively. That being so, I am of the view that the facts in the two cases cited above can be distinguished from the instant case wherein the issue is whether under the terms of the lease agreement, the duty to 'replace' the roofs as opposed to 'repair' is upon the lessee, ie Mok. I do not think that one can term the replacement of the whole roof of a building as 'repair'.

Counsel has however argued that even the replacement of a whole wall of demised premises have been held to be the responsibility of the tenant which was the position in *Lurcott v Wakely & Wheeler* [1911] 1 KB 905; [1911–13] All ER Rep 41. In that case the front external wall of the house had to be taken down and replaced — the house was very old and the condition of the wall was caused by old age, and the wall could not have been repaired without rebuilding it. The lessee was required to 'keep

A in thorough repair and good condition all the said premises hereby demised ...'. In holding that the tenant was responsible for the costs of replacing the wall, Fletcher Moulton LJ said ([1911] 1 KB 905 at p 916; [1911–13] All ER Rep 41 at p 45):

> ... while the age and the nature of the building can qualify the meaning of
B the covenant, they never can relieve the lessee from his obligation. If he chooses to undertake to keep in good condition an old house, he is bound to do it, whatever be the means necessary for him to employ in so doing.

and [1911] 1 KB 905 at pp 918–919; [1911–13] All ER Rep 41 at p 46 said:

C > I come now to the third covenant, which is to repair. Here there is a duty to perform an operation. No doubt, if you thoroughly repair, it will put a house in a good condition and in a state of thorough repair. But it is plain that the word 'repair' refers to the operation to which the defendants bind themselves to have recourse. For my own part, when the word 'repair' is applied to a complex matter like a house, I have no doubt that the repair
D includes the replacement of parts.

However, in the same case, Buckley LJ said ([1911] 1 KB 905 at pp 923–924; [1911–13] All ER Rep 41 at p 49):

> 'Repair' and 'renew' are not words expressive of a clear contrast. Repair
E always involves renewal; renewal of a part; of a subordinate part ... Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion. I agree that if repair of the whole subject-matter has become impossible a covenant to repair does not carry
F an obligation to renew or replace. That has been affirmed by *Lister v Lane* [1893] 2 QB 212 and *Wright v Lawson* (1903) 19 TLR 203, 510. But if that which I have said is accurate, it follows that the question of repair is in every case one of degree, and the test is whether the act to be done is one which in substance is the renewal or replacement of defective parts, or the renewal or replacement of substantially the whole. It is with such limitations as these
G that the language in the cases which have been cited to us must be read.

and [1911] 1 KB 905 at p 926; [1911–13] All ER Rep 41 at p 50 Buckley LJ said:

> All the cases, to my mind, comes only to this, that the question is one of degree, and what we have to look to in the present case is to see whether the
H official referee in his findings of fact has treated the front wall of this house as being a subsidiary part of a larger structure, or has regarded the necessary operations as amounting to substantially a re-erection of the house.

Both Fletcher Moulton LJ and Buckley LJ agreed that the lessee was liable under the covenant for the cost of taking down and rebuilding the wall.

I With respect, I cannot see the relevance of the case cited above in relation to the facts found in the instant case. In that case the operative words were that the lessee was required 'to keep in thorough repair and good condition all the said premises thereby demised ... '. The court ruled

that those words included replacement of defective parts. In the instant case the words found in sub-cll (g) and (k) are 'to keep the demised premises ... in tenantable repair ... fair wear and tear excepted' and 'to repair and maintain the roofs ...' respectively, which to me are quite different. Furthermore, it was a finding of fact in that case that the wall which required replacement was only a subsidiary part of the building.

Is the roof of a building a subsidiary or a subordinate part of the building? Counsel for KPKK has referred to the case of *Staples & Co v Berryman & Anor* [1928] NZLR 68 where the dispute relates to the roof of the demised premises. In that case, the plaintiff company was the registered proprietor of a memorandum of lease for 25 years and the lease contained a covenant on the plaintiff company's part during the continuance of the term to keep and at the expiration thereof to yield up all buildings and erections in 'thoroughly good and tenantable condition and repair'. By memorandum of lease the plaintiff company subleased the premises to the defendants for a term of two years and four months.

The sublease contained, inter alia, a provision that the plaintiff company might enter into and upon the premises and inspect and view the condition thereof, 'and if any defect or want of reparation or failure to paint and paper in accordance with the covenants herein contained shall upon such inspection be found, and if the lessees shall not within seven days after the receipt of notice in writing in that behalf make good and restore the same, then and in such case, it shall be lawful for the company to enter into and upon the demised premises as aforesaid and make good and restore all such defects and wants of reparation in accordance with the said covenants, and the cost and expense of so doing, with interest thereon at the rate of 10% per annum, computed from the time the same shall be paid or expended, shall be borne and paid by the lessees to the company, and shall be recoverable by distress or otherwise in all respects as rent in arrear is recoverable'.

Ostler J said at p 69:

> The main defence is as to the cost of repairing the roof. It was contended as a question of law that under their covenant to repair the defendants were not liable in law for the cost of renewing the iron on the roof. In my opinion that contention is unsound. Where there is a covenant to keep in repair, that involves an obligation to renew where the thing affected is a subordinate part of the whole structure, as in the case of a roof or a wall: see *Lurcott v Wakely and Wheeler.*

With respect, I think the facts of the above-mentioned case are quite different from the instant case. The dispute in that case was between a lessee and a sublessee and the problem with the roof of the demised premises only relate to the iron on the roof — the iron of the roof required replacement and not the whole roof. In the instant case the issue relates to the whole roof.

In his reply Mok's counsel posed the question as to whether replacing the entire roof would fall within the meaning of the word 'repair'. He argued that based upon the engineer's reports and the evidence adduced,

A it was clear that the roofs cannot be repaired but had to be replaced and hence, replacing the roofs would amount to work which Mok was not bound to do under cl 4 of the lease agreement. He submitted that the engineers have confirmed that the roofs were in a very bad condition and need to be replaced and that the lessee's covenant is only 'to repair' and not to replace; furthermore the costs of replacement would be so much B that it cannot reasonably come within the covenant.

With regard to the meaning of the word 'repair', counsel referred to s 5 of the Code which reads:

> 'in repair', in relation to any building or part of a building, means in such C state of repair as that in which a prudent owner might reasonably be expected to keep his property;

He then referred to s 233(b) of the Code which reads:

> In the absence of any express provision therein to the contrary, any agreement to keep any building or part of a building 'in repair' implied in any lease or D sub-lease (whether granted before or after the commencement of this Act) —
>
> ...
>
> (b) shall not be taken to require the building or part in question to be put into a better state of repair than that in which it was at the E commencement of the lease or sub-lease.

He submitted that replacement of the roofs would put that part of the said premises in a better state of repair than that in which it was at the commencement of the lease. To support his contention that a covenant 'to repair' cannot amount to a covenant to replace, he referred to the case of F *Lister v Lane & Nesham* [1893] 2 QB 212; [1891–94] All ER Rep 388 (which was referred to by Buckley LJ in *Lurcott v Wakely & Wheeler*).

In that case, the plaintiffs granted to the defendants a lease of a house containing a covenant by the lessee that they would 'when and where and as often as occasion shall require, well, sufficiently, and substantially, G repair, uphold, sustain, maintain, amend and keep' the demised premises, and the same 'so well and substantially repaired, upheld, sustained, maintained, amended and kept', at the end of the term yield up to the lessors.

Before the end of the term, one of the walls was bulging out and after the end of the term, the house was condemned by the district surveyor as H a dangerous structure and was pulled down. The plaintiffs sought to recover from the defendants the cost of rebuilding the house. It was found that the house was at least 100 years old and that the bulging of the wall was caused by the rotting of the timber. It was held that the defect having been caused by the natural operation of time and the elements upon a I house the original construction of which was faulty, the defendants were not under their covenant liable to make it good.

Lord Esher MR said ([1893] 2 QB 212 at p 216; [1891–94] All ER Rep 388 at p 390):

You have to consider not only what the damage is — what is the amount of repair required — but also whether the covenant has been broken. That I take to be the right rule, and it is derived partly from the summing-up of Tindal CJ, in *Gutteridge v Munyard* (1834) 1 Mood & Rob 334, which is always cited on this point. The learned Chief Justice said:

> 'Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term or of greater value than it was at the commencement of the term.'

and [1893] 2 QB 212 at pp 216–217; [1891–94] All ER Rep 388 at p 390 said:

> ... if a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing, and, moreover, the result of the nature and condition of the house itself, the result of time upon that state of things, is not a breach of the covenant to repair ...
>
> Whatever happens by natural causes to such a house in course of time — the effects of natural causes upon such a house in the course of time — are 'results from time and nature which fall upon the landlord', and they are not a breach of the covenant to repair. They are matters which must be taken into account in considering whether the covenant to repair has been broken, and, when they are the results of time and nature operating on such a house, they are not a breach of the covenant, and the tenant is not bound to do anything with regard to them ... The tenant from time to time did the proper repairs, and now the plaintiffs want him to do something for which he is not liable, and which would be of no avail unless he built a house of an entirely different kind.

I think the facts in the instant case are clear. The evidence adduced have shown that the roofs to the premises need to be replaced. In the engineer's report dated 20 July 1990, he stated that 'the roof covering of all the main buildings is in a very bad state. The life span of the roof cover is running out and therefore it is not technically viable to replace a few sheets here and there leaving the rest intact.' He also gave a similar report on 5 March 1991.

A question which really needs to be answered is what do the words, 'fair wear and tear excepted' found in cl 4(g) and (h) of the lease agreement, mean? In my opinion it would be Mok's duty to repair the roofs if the work only involved replacing the roof sheetings here and there but I think that duty comes to an end when it is no longer 'technically viable to replace a few sheets here and there'. The entire roofs of the premises need to be replaced and the engineer's report has shown that its life span has ended, which to me would mean, that there has been 'fair wear and tear' of the roofs. This, to me, would also mean that because they need to be replaced due to 'fair wear and tear', the duty to replace would fall on KPKK.

A With regard to the words 'fair wear and tear', counsel for KPKK has referred to me the case of *Collins v Winter & Anor* [1924] NZLR 449 wherein, Sim J said at p 452:

> In the absence of any contract to do so, the landlord is not liable to effect or pay for any repairs in the demised premises: ... And the mere fact that
B fair wear-and-tear is excepted from the tenant's covenant to repair does not impose on the landlord any obligation to make good any damage due to wear-and-tear: ...

With the greatest respect, I do not agree that the words 'fair wear and tear excepted' do not impose on the landlord to make good such damage. To
C decide in that manner in the instant case would make the words 'fair wear and tear excepted' found in cl 4(g) and (h) of the lease agreement meaningless and redundant.

Is the roof of a building a subsidiary or a principal part of the building? The case of *Staples & Co v Berryman & Anor* seems to suggest
D that a roof is a subordinate part of a building. With respect, I disagree. In my view, the roof forms a principal part of a building. In the instant case, the premises were used by the subtenants as a factory — they were in the business of manufacturing and their main complaints were that the leaks in the roofs have affected their machinery and hence their productivity.

They cannot function if the roofs leaked and there was evidence to
E show that a few of the subtenants moved out because of the leaks. In my view a roof cannot be a subsidiary part of a building if its existence is vital in relation to its usage.

Be that as it may, I think the true test is whether replacing the roofs would amount to putting the premises into a better state of repair than that
F in which it was at the commencement of the lease. In the instant case, I would think so. When KPKK leased the premises to Mok the evidence clearly shows that KPKK knew the premises were in a ruinous condition. When Mok agreed to take it in its 'as is' condition, he did maintain the building and carried out repairs to several parts of the premises including
G the roofs until they could not be repaired further. I would think that replacing the entire roofs of the said premises and having to pay for it would go far beyond what any reasonable person would have contemplated under the words 'to keep the demised premises ... in tenantable repair' appearing in cl 4(g) of the lease agreement.

H What is the meaning of the word 'repair'? In *Post Office v Aquarius Properties Ltd* [1985] 2 EGLR 105 at p 107, Hoffmann J said:

> ... 'repair' is an ordinary English word. It also contains a timely warning against attempting to impose crudities of judicial exegesis upon the subtle and often intuitive discrimination of ordinary speech. All words take meaning from context and it is, of course, necessary to have regard to the language
I of the particular covenant and the lease as a whole, the commercial relationship between the parties, the state of the premises at the time of the demise and any other surrounding circumstances which may colour the way in which the word is used. In the end, however, the question is whether the

> ordinary speaker of English would consider that the word 'repair' as used in the covenant was appropriate to describe the work which has to be done.

The words 'repair' and 'renewal' have been distinguished by Buckley LJ in *Lurcott v Wakely & Wheeler* [1911] 1 KB 905 at p 924; [1911–13] All ER Rep 41 at p 49, when he said:

> Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion. I agree that if repair of the whole subject-matter has become impossible a covenant to repair does not carry an obligation to renew or replace ... But if that which I have said is accurate, it follows that the question of repair is in every case one of degree, and the test is whether the act to be done is one which in substance is the renewal or replacement of defective parts, or the renewal or replacement of substantially the whole.

What seems to be the correct approach to disputes of this nature? In *Brew Bros Ltd v Snax (Ross) Ltd & Anor* [1970] 1 QB 612 at p 640; [1970] 1 All ER 587 at p 602; [1969] 3 WLR 657 at p 677, Sachs LJ was of the following view:

> It seems to me that the correct approach is to look at the particular building, to look at the state which it is in *at the date of the lease*, to look at the precise terms of the lease, and then come to a conclusion as to whether, on a fair interpretation of those terms in relation to that state, the requisite work can fairly be termed repair. However large the covenant it must not be looked at in vacuo.

In *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12; [1979] 1 All ER 929; [1979] 2 WLR 898, Forbes J was of the view that in deciding as to whether the disputed works amount to 'repair' or whether it can be considered as giving the landlord a wholly different thing which he demised, the proportion of the costs of the disputed works in relation to the value of the premises may be a useful guide.

In that case the plaintiff landlords, leasehold owners of two blocks of flats, claimed that the defendant tenants of those premises were liable under a repairing covenant to repay to the landlords on demand the costs of repairs carried out by the landlords to make good defects in the premises; Forbes J said ([1980] QB 12 at p 21; [1979] 1 All ER 929 at p 937; [1979] 2 WLR 898 at p 905):

> The true test is, as the cases show, that it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised.
>
> In deciding this question, the proportion which the cost of the disputed work bears to the value or cost of the whole premises, may sometimes be helpful as a guide.

The authorities referred to above seem to suggest that the correct approach to a dispute of this nature is to ask the following questions:

A (i) what was the state of the building on the date the lease was entered into;

(ii) what is the precise term of the lease which is in dispute;

(iii) what is the damage;

(iv) what is the amount of repair required;

B (v) whether the disputed works amounts to 'repair' or whether it can be considered as giving the landlord a wholly different thing which he demised;

(vi) if the disputed works amounts to a replacement, would it be tantamount to restoring the building in a renewed form of a greater C value than it was at the commencement of the lease; and

(vii) what is the cost of the repair.

I think the answers to the first four questions have been answered in the instant case, viz I have found that the roofs were in a bad condition at the D commencement of the lease and that they were beyond repair and need to be replaced. I am also of the view that Mok has not breached his covenant to repair as the replacement of the roof was not within the contemplation of cll 4(g) and (h) of the lease agreement. I am of the view that if it was Mok's responsibility to replace the roofs, it is tantamount to restoring the premises in a renewed form of a greater value than it was at the E commencement of the lease and this finding can be supported by the evidence of DW1, the manager for the properties division of UMW in 1989, who stated in evidence as follows:

> I took Mr Mok to see the premises. His reaction is that the building needed to be repaired and that the roof need to be replaced or repaired. I did tell F him that to repair the premises would mean that the rental would be higher as we have to offset the cost. I can't remember how much higher.

This would seem to suggest that if Mok replaced the roofs at his own cost, it would definitely enhance the value of the premises as it would be able to attract higher rental and that to me would amount to restoring the premises G in a renewed form of a greater value than it was at the commencement of the lease.

With regards to the cost of the disputed works, no evidence was adduced at the trial as to what would be the estimated costs of replacing the roofs. However, at p 193 of Vol 1 of the agreed bundle of documents H introduced at the trial, a letter from a company called Metro Setia Sdn Bhd, dated 10 August 1990 which was addressed to Mok as a result of the latter's inquiry, could serve as a guide to the estimated cost of replacing the roofs that letter states that the costs to dismantle the existing roofing sheets and to install new roofing sheets for Blocks G1, G2, A, B, F and the canteen would be in the region of RM464,217.50 if colour sheets are used I and in the region of RM432,202.50 if non-colour sheets are use [1]. This, to me, is a substantial sum in relation to the lease. The evidence shows that at the commencement of the lease, Mok was collecting approximately RM118,025 monthly from the rental that he received from his subtenants

and he had to pay the monthly rental of RM84,000 to KPKK, the difference being RM34,025 per month then.

In his evidence Mok also stated that in September 1992 he was making a gross profit of about RM43,000 and that at the time when the lease was forfeited, he was expecting a gross profit of about RM60,000. In his evidence, Mok also claimed that when he took over the premises, he spent about RM1m for repairs and renovations to make it habitable and tenantable. There was also evidence which shows that the machinery used in the car-assembly plant and several items and parts which were used to assemble the cars were left there for several months after Mok was given vacant possession and with regard to this, Mok claimed that he had to spend quite a sum to clear and tidy the premises. It was his stand at the outset that KPKK should replace the roofs as evidenced by his note to them dated 25 June 1990 which reads:

> Main Building Roof
>
> The roof has not been changed for almost 30 years. It is constantly under our maintenance and much effort has been committed to repair it. We find that it is beyond repair. We would appreciate if the roof could be replaced with a new one.

Looking at the proportion which the estimated cost of the disputed work bears to the value of the lease to Mok and the expenditure that he had to bear when he undertook repairs of the said premises at the commencement of the lease, I would think that to insist that Mok is responsible to replace the roofs and bear its cost would go far beyond what any reasonable person would have contemplated under the word 'repair'. The roofs were beyond repair as stated by the engineer's reports and to me the replacement of the roofs cannot be termed 'repairs' within the terms of the covenant.

KPKK's contention that Mok himself was responsible for the leaks in the roofs as he had undertaken to remove several fixtures, which included chimneys attached to the roofs, also cannot hold water as prior to the commencement of the lease itself, there was evidence that the roofs were already in that condition as evidenced by a copy of a report based upon an inspection on the said premises made by officials from KPKK itself on 25 February 1988, which reads:

> Roof: Badly rusted and areas at paint-shop and maintenance area are having holes.

I think the evidence is clear that the roofs were beyond repair due to 'fair wear and tear' and need to be replaced and that being so, is excepted from Mok's covenant to repair. The engineer's report dated 5 March 1991 confirm that the roofs are in that condition known as 'fair wear and tear' when he stated (with regard to Block G2 of the said premises) that 'the condition of the entire roof of this building was badly rusted and corroded as well. This showed that the surrounding air had a high level of corrosiveness.'

Thus, on the facts and on the proper construction to cll 4(g), (h) and (k) of the lease agreement dated 10 August 1989, it is my finding that the

duty to replace and pay the cost of replacing the roofs to the premises is clearly on the lessor, ie KPKK.

With regard to the second issue, that is, whether the letter of forfeiture of 13 September 1993 was justified on the facts and under the terms of the lease agreement, counsel for KPKK posed the question as to whether Mok can withhold rental even after setting off the costs of the roof repairs that he had carried out. He contended that KPKK's letter of forfeiture due to non-payment of rental by Mok was justified as what Mok can set off is what he had spent for repairs and that if there was an obligation to repair, a breach of that does not amount to an abatement of obligation to pay rent. He then referred to the rule with regard to set-offs as explained by Raja Azlan Shah J (as he then was) in the case of *Shanghai Hall Ltd v Town House Hotel Ltd* [1967] 1 MLJ 223 at p 227 where the learned judge said:

> In view of the modification of the common law rule with regard to set-off by legislation, set-off can now be pleaded in respect of mutual debts or such matters or complaints as are allowable to reduce or extinguish the claim or other matters of equity which formerly might have called for injunction or prohibition.

With regard to the third issue, namely, whether, on the facts, there was inducement to breach the subtenancies by the landlord (KPKK) and whether KPKK is liable to Mok for damages under this head, evidence was adduced to show that on the following dates, KPKK entered into direct tenancy agreements (exhs P34 A–D) with four of Mok's subtenants, namely:

(a) on 5 April 1995 with Superpoly Packaging Sdn Bhd (the fourth subtenant defendant);

(b) on 13 July 1994 with Bensons Metal Products Sdn Bhd (the former third subtenant defendant);

(c) on 20 December 1994 with Kensia Industries Sdn Bhd (the seventh subtenant defendant); and

(d) on 27 January 1995 with I & S Enterprise.

Counsel for KPKK argued that when the direct tenancies were entered into between KPKK and those subtenants, the earlier subtenancies had already come to an end arising out of forfeiture of the main lease as evidenced by the said letter, dated 13 September 1993, sent by solicitors for KPKK to Mok's solicitors, which reads:

> We note that your client has failed to remedy his breach of the above lease and the same is now determined and forfeited.
>
> Kindly request your client to immediately vacate the above property and deliver vacant possession of the same to our client.

He submitted that the lease was subsequently forfeited on 22 September 1993 and that all the direct tenancies complained of were entered into only after that date.

In his reply, counsel for Mok submitted that besides the crucial issue as to whether Mok as head-lessee was obliged to replace the roofs under the repair covenant contained in cl 4(h) of the lease agreement, the other crucial issue is whether, based upon the documentary and oral evidence, it is shown that KPKK induced breaches of contract by dealing directly with Mok's sub-lessees. He contended that both these crucial issues would cover the question of the withholding of rentals for certain periods by Mok caused in turn by the withholding of rentals by the subtenants to Mok and that it all turned on the status of the roofs, ie as to whose responsibility it was to replace the roofs. He argued that at all material times, there was a dispute between Mok and KPKK on this question which reflected itself from January 1993 onwards by Mok withholding rental.

In relation to the second and third issues posed by the parties, KPKK's covenant as lessor as provided for under cl 5(a) of the lease agreement would be relevant. Clause 5(a)reads:

> That the lessee paying the rent herein reserved and performing all covenants on his part shall peacefully hold and enjoy the demised premises during the term of this lease (or any renewal thereof) without interruption by the lessor or any person claiming through under or in trust for him (subject however to clause 4(h) above), or by any other person whosoever and howsoever arising.

Counsel for Mok argued that this cause of action, that is, whether KPKK induced breaches of contract by directly dealing with Mok's subtenants, is largely based on KPKK acting contrary to the terms of the main lease agreement and dealing directly with Mok's subtenants with whom they had no direct legal and/or contractual relationship. He contended that prior to entering into the lease agreement, KPKK insisted that a clause be inserted into the agreement to provide that the subtenancies should expire or terminate together with the main tenancy, but simultaneously, KPKK signed a 'secret collateral agreement' with one of Mok's subtenants, namely, Bensons Metal Products Sdn Bhd ('Bensons'), giving the latter an option to continue as a tenant notwithstanding the termination of Mok's tenancy. He then referred to a letter dated 11 August 1989 (Mok's sublease with Bensons was also signed on 11 August 1989) from Bensons and addressed to KPKK which reads:

> We refer to the above matter wherein Mok Tai Dwan (NRIC No 3324090) (the chief tenant) holds a lease of the premises pursuant to the lease agreement ...
>
> We hereby confirm our agreement with you that in the event that the chief tenant defaults under the lease agreement which results in forfeiture of the lease with you and consequently the sub-tenancy agreement with the chief tenant, we shall be entitled to enter into a fresh lease agreement with you either for a period of six (6) months from the date of the said forfeiture or for the remaining unexpired term of the lease under the lease agreement from the date of the said forfeiture (such option to be at our sole discretion to exercise at the relevant time) subject to the same terms and conditions as contained in the lease agreement.

A Counsel submitted that besides the letter referred to above, the following were also material to support Mok's cause of action that KPKK induced breaches of contract between Mok and his subtenants, namely:

(i) that at the time when Mok had full-tenancy occupation of the premises from 1990 to 1993, the main rental that Mok was paying to KPKK
B was only RM92,400 per month as opposed to RM155,800 per month that Mok collected from his subtenants, the difference being about RM60,000 per month;

(ii) that after the purported forfeiture of the lease, many of the subtenants signed up directly with KPKK as its own tenants with most of them
C paying the same rental (exhs P34 A–D); in relation to this, counsel submitted that what was significant here is that KPKK did not exercise its rights under the main lease agreement in requiring Mok's subtenants to leave after the determination of the lease, a right which it specifically insisted upon and obtained at the time of entry into the main lease; and

D (iii) that when KPKK served its notice of breach of the lease and intention to forfeit on Mok, that notice was specifically taken around and served on all the subtenants by KPKK which then held discussions with the subtenants on the possibility of having direct tenancy arrangements with KPKK — counsel argued that two things must be
E noted, namely:

(a) that there is no requirement in law that the notice of breach should be served on or be notified to the subtenants;

(b) that the decision to deal directly with the subtenants and sign them up as KPKK's own tenants was considered by KPKK as 'a
F good business proposition'; he pointed out that this was evidenced by an internal memo dated 26 August 1993, written by the former assistant manager (DW2) of the legal division of UMW, the parent company of KPKK, to its property manager about the lease which reads:

G Further to my letter of 23 August 1993 to our solicitors M/s Lee Hishammuddin, kindly be advised that a copy of our solicitors' notice dated 23 August 1993 to the above-named lessee has been served on each of the sub-tenants occupying the above property save one whose premises was closed during our visit. A copy of our solicitors' notice containing acknowledgment of receipt by the relevant sub-tenants is enclosed for your
H records.

From our discussion with the sub-tenants and copies of documents shown and given to us during our visit, we have established that monthly rental received by Mok are approximately as follows:

	Tenant	(RM)
I 1	Megar Jouder Industries Sdn Bhd	8,000
2	Bensons Metal Products Sdn Bhd	55,000
3	Superpoly Packaging Sdn Bhd	8,000

4	Explast Industries Sdn Bhd	10,000
5	Flexible Packaging (M) Sdn Bhd	5,000
6	Kensia Industries Sdn Bhd	30,000
7	Tru-Tech Electronics (M) Sdn Bhd	15,000
8	Hasrat Projek (M) Sdn Bhd	5,000

Most of them have also paid a deposit of six (6) months to Mok at the commencement of their sub-tenancies. They are generally amenable to the suggestion that they continue as our tenants in the event Mok is unable to comply with our solicitors' notice.

Since it may be a good business proposition to deal with the sub-tenants direct, you may perhaps wish to lay the groundwork of negotiating terms and conditions with the sub-tenants while we are proceeding with legal action to evict Mok.

I enclose photocopies of the name-card of each of the sub-tenants as well as documents given by some of the sub-tenants evidencing recent payment of rents by them to Mok for your perusal.

Counsel for Mok submitted that when the above memo was made, the lease had not yet been forfeited, and hence, Mok was entitled to remedy any breach within the notice period under the law as provided for under s 235 of the Code which reads:

> Notwithstanding anything to the contrary contained therein, no person or body shall be entitled to enforce, by action or otherwise, the forfeiture of any lease, sub-lease or tenancy for breach of any of the provisions thereof unless and until that person or body has served on the lessee, sub-lessee or tenant for the time being a notice in writing —
>
> (a) specifying the particular breach complained of;
>
> (b) if the breach is capable of remedy, requiring him to remedy it, and
>
> (c) in any case other than non-payment of rent requiring him to make compensation in money for the breach,
>
> and the lessee, sub-lessee or tenant on whom the notice is served has failed, within a reasonable time thereafter, to remedy the breach (if it is capable of remedy) and to make reasonable compensation in money therefor to the satisfaction of that person or body.

All in all, what counsel for Mok is contending is that the facts referred to above as a whole amounted to what, at common law, has been designated as 'procuring or inducing a breach of contract' which has been held to be an actionable wrong. In *DC Thomson & Co Ltd v Deakin & Ors* [1952] Ch 646, which was referred to by counsel in his submission, the acts complained of by the plaintiff were in the nature of allegedly wrongful interference with contractual relations between the plaintiffs and other companies, designed to deprive, and in fact depriving the plaintiffs, who are printers and publishers, of necessary supplies of paper and ink.

Jenkins LJ said (at pp 692–693) :

A Lord Simon LC's third proposition refers to what may be described as the primary form of the type of wrong held to be actionable in *Lumley v Gye* (1853) 2 E & B 216, and in that form commonly designated 'procuring or inducing a breach of contract'.

... a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations B recognized by law if there be no sufficient justification for the interference.

With regard as to what are the necessary ingredients of an actionable interference with contractual rights, Jenkins LJ said (at p 694):

The breach of contract complained of must be brought about by some act C of a third party (whether alone or in concert with the contract breaker), which is in itself unlawful, but that act need not necessarily take the form of persuasion or procurement or inducement of the contract breaker, in the sense above indicated.

Direct persuasion or procurement or inducement applied by the third party to the contract breaker, with knowledge of the contract and the D intention of bringing about its breach, is clearly to be regarded as a wrongful act in itself, and where this is shown a case of actionable interference in its primary form is made out: *Lumley v Gye*.

But the contract breaker may himself be a willing party to the breach, without any persuasion by the third party, and there seems to be no doubt that if a third party, with knowledge of a contract between the contract E breaker and another, has dealings with the contract breaker which the third party knows to be inconsistent with the contract, he has committed an actionable interference ...

and at p 695, said:

It is to be observed that in all these cases there is something amounting to F a direct invasion by the third party of the rights of one of the parties to a contract, by prevailing upon the other party to do, or doing in concert with him, or doing without reference to either party, that which is inconsistent with the contract; or by preventing, by means of actual physical restraint, one of the parties from being where he should be, or doing what he should do, under the contract.

G Counsel also referred to the case of *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 at p 108 wherein Wan Suleiman FJ said:

Learned counsel for the appellant referred us to *Greig v Insole* [1978] 1 H WLR 302, 332, 340 a passage in which, he submits summarizes the law regarding the tort of inducement to breach of contract:

'At common law it constitutes a tort for a third person deliberately to interfere in the execution of a valid contract which has been concluded between two or more other parties, if five conditions are fulfilled:'

I The five conditions, according to *Greig v Insole* [1978] 3 All ER 449; [1978] 1 WLR 302 are:

(i) there must be (a) 'direct' interference or (b) 'indirect' interference coupled with the use of unlawful means;

(ii) the defendant must be shown to have knowledge of the relevant contract; A

(iii) he must be shown to have had the intent to interfere with it;

(iv) the plaintiff must show that he has suffered special damage; and

(v) so far as it is necessary, the plaintiff must successfully rebut any defence based on justification which the defendant may put forward. B

Can the above acts and incidents complained of be sufficient to support Mok's contention that KPKK induced breaches of contract by dealing directly with the subtenants?

With regard to the 'secret collateral agreement' made between KPKK and Bensons, I am of the view that that agreement, if at all it was one, was too remote under the circumstances to amount to an interference or even a deliberate attempt to interfere with the subtenancy agreement entered into between Mok and Bensons. DW4, the general manager of Bensons, explained that Bensons' letter to KPKK dated 11 August 1989 (reproduced earlier) was merely a 'safety blanket' in case something went wrong with the main lease between Mok and KPKK. In his evidence, he explained that a sudden end to the main lease will cause Bensons problems in having to look for alternative premises to move their machinery and equipment. C D

To me, that letter merely confirmed an understanding that has been arrived at by both Bensons and KPKK on the eve of the lease — it was more like a memorandum of understanding rather than an agreement. In relation to this 'secret collateral agreement', the evidence also shows that KPKK wrote a letter to Bensons on 9 February 1993 which read: E

> We regret to have to inform you that the abovenamed Mr Mok Tai Dwan has, among other things, defaulted in the payment of rent to us since October 1992. An appropriate notice dated 11 January 1993 has been served on him requiring him to remedy his default ... F
>
> We wish to refer to our agreed arrangement with you as contained in your letter dated 11 August 1989 (a copy of which is enclosed) and would appreciate your letting us know your intention particularly in respect of the paragraph thereof. G

To me, that second letter confirms that the alleged agreement was more an understanding between the two parties and that that letter, at most, amounts to an invitation to treat on the part of KPKK — they wanted to know whether Bensons was still interested to continue renting that part of the premises in the eventuality Mok fail to remedy his default with regard to the payment of rent. It was not a wrongful act and cannot amount to an actionable interference. H

What is clear is that there is no evidence of any contractual arrangement between KPKK and Mok's subtenants and what is clear is that KPKK cannot collect rental from the subtenants as long as the main lease is still in force and there is no evidence that KPKK had done so; the position is that Mok has to pay rental to KPKK regardless of whether his subtenants pay rental to him. I am also of the view that the so-called I

A 'secret collateral agreement' between KPKK and Bensons, if at all it can be termed one, was only a fall-back plan by Bensons — Bensons have given a reasonable explanation with regard to this 'fall-back' plan and under the circumstances, I cannot see anything wrong with that arrangement.

B Mok has also complained about the serving of the notice by KPKK to remedy the breach with regard to the non-payment of rental on the subtenants which counsel for Mok argued was not a requirement of the law. The evidence shows that by its letter dated 23 August 1993 KPKK's solicitors sent a notice to Mok which reads:

C > We are in the premises instructed by our clients to request you, which we hereby do, to remedy the aforesaid breach by paying to us, as solicitors for our clients, the aforesaid sum of RM739,200 within seven (7) days from the date of this letter.
>
> Take notice that in the event you fail to remedy the aforesaid breach in the manner and within the period stipulated above, the lease, upon the
D > expiry of the period stipulated above, will be and shall be deemed forfeited by our clients without any further notice to you and our clients will exercise all rights and remedies available to them for, inter alia, the recovery of the said sum and possession of the said premises.

Copies of that notice were delivered to several of Mok's subtenants,
E including Bensons, and they acknowledged receipt thereof by signing on KPKK's copy of the notice. Mok's counsel have argued that this action of serving that notice upon the subtenants was wrong in law. I cannot fathom such an argument. DW2 have explained that they did not wait for seven days before serving that notice as they did not want the subtenants to be caught unaware. Furthermore, service of such a notice on the subtenants
F also do not seem to contravene s 235 of the National Land Code. Under the circumstances, I am of the view that KPKK's action do not amount to an actionable interference. The evidence shows that the writing was on the wall, so to speak, that there was a likelihood that the main lease will be terminated and informing the subtenants a few days in advance of the
G proposed forfeiture cannot be wrong in law. I am of the view that KPKK have not overstepped the bounds of lawful action by serving the notice on the subtenants.

With regard to the internal memo (reproduced earlier), to me, it was what it was, an internal memo. It was not meant to be distributed to third parties and there is also no evidence to show that it was actually distributed
H to any third party. It was merely a memo sent by the legal division of UMW (the parent company of KPKK) to their property manager informing the latter that Mok's subtenants 'are generally amenable to the suggestion that they continue as our tenants in the event Mok is unable to comply with our solicitor's notice'. The contents of that memo do not at all show
I that KPKK have induced the subtenants to breach their agreements with Mok. Its contents also do not reflect that KPKK intended to interfere with the subtenancy agreements. In *Greig v Insole* the judge said ([1978] 1 WLR 302 at 332):

> As to the meaning of 'interference', this is not confined to the actual procurement or inducement of a breach of contract; it can cover the case where the third person prevents or hinders one party from performing his contract even though this be not a breach.

I cannot see anything in that memo which could amount to an inducement of a breach of contract or which could amount to an action which prevents or hinders Mok from performing his covenants under the lease agreement. That memo also did not convey any message to the effect that KPKK felt that it had made a mistake by granting the lease to Mok and that they themselves could make a good profit by entering into direct tenancy agreements with the sub-lessees, which was what was in fact suggested by Mok's counsel to DW2, the former assistant manager of the legal division of UMW, when the latter was being cross-examined. In relation to this, DW2 have stated that at the outset, Mok wanted to rent only part of the premises whereas what KPKK had in mind was someone who was willing to rent the whole of the said premises. I also cannot find anything in that memo which reflected that there was an attempt by KPKK to deliberately interfere with the subtenancy agreements between Mok and his subtenants.

On the whole, I cannot see any act of actionable interference on the part of KPKK in the contractual relations between Mok and his sub-lessees and that being so, in answer to the issue posed to me, it is my finding that, based upon the documentary and oral evidence, there is nothing to show that KPKK have induced breaches of contract by their direct dealings with Mok's sub-lessees.

With regard to the second question posed, I am of the view that it can only be dealt with at the second stage, ie when the issue on quantum of damages is assessed, as no sufficient evidence has been adduced on the amount of rental due.

Mok's application allowed in part.

Reported by PY Lo